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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 JOSHUA JAMES MULLENS,

10 Plaintiff,

11 v.

12 CITY OF LAKEWOOD, et al.

13 Defendants.

CASE NO. C15-5442 BHS-KLS

ORDER GRANTING MOTION  
TO ALLOW LATE FILING AND  
DENYING PLAINTIFF'S  
MOTION FOR  
RECONSIDERATION

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15 This matter comes before the Court on Plaintiff Joshua James Mullens's  
16 ("Mullens") motion for reconsideration of the Court's order declining to adopt report and  
17 recommendation recommending that the Court deny Defendants City of Lakewood,  
18 Andrew Gildehaus, Aaron Grant, and Mark Holthause's ("Defendants") motion to  
19 dismiss (Dkt. 23) and motion to allow late filings (Dkt. 24). The Court has considered  
20 the pleadings filed in support of the motions and the remainder of the file and hereby  
21 rules as follows:  
22

## I. PROCEDURAL HISTORY

On June 29, 2015, Mullens filed a motion to proceed *in forma pauperis* and a proposed complaint. Dkt. 1. On July 1, 2015, the Honorable Karen L. Strombom, United States Magistrate Judge, granted the motion, declined to serve the complaint, and ordered Mullens to either amend his complaint or address the identified deficiencies no later than July 31, 2015. Dkt. 6. Failure to do either would result in dismissal of the complaint as frivolous under 28 U.S.C. § 1915(e). *Id.*

On August 6, 2015, Judge Strombom issued a report and recommendation recommending that the Court dismiss the action and that the dismissal count as a strike under 28 U.S.C. § 1915(g). Dkt. 7. On August 13, 2015, Mullens filed objections asserting reasons for failing to meet Judge Strombom's deadline. Dkt. 8. On September 28, 2015, the Court declined to adopt the report and recommendation and remanded for consideration of Mullens's response. Dkt. 9.

On October 29, 2015, Mullens filed an amended complaint. Dkt. 11. On October 30, 2015, Judge Strombom directed service of the complaint. Dkt. 12.

On November 12, 2015, Defendants filed a motion to dismiss the complaint arguing that Mullens failed to timely serve the complaint. Dkt. 14. Mullens did not respond. On December 21, 2015, Judge Strombom issued a report and recommendation ("R&R") recommending that the Court deny the motion. Dkt. 17. On January 4, 2016, Defendants filed objections. Dkt. 18. On February 10, 2016, the Court declined to adopt the R&R and remanded for further consideration. Dkt. 19.

1 On March 10, 2016, Judge Strombom appointed counsel to represent Mullens.  
2 Dkt. 20. On March 11, 2016, Judge Strombom ordered additional briefing on  
3 Defendants' motion to dismiss. Dkt. 22.

4 On March 24, 2016, Mullens filed the instant motion for reconsideration and  
5 motion to allow the late filing. Dkts. 23, 24.<sup>1</sup>

## 6 II. DISCUSSION

7 Motions for reconsideration are governed by Local Rule CR 7(h), which provides  
8 as follows:

9 Motions for reconsideration are disfavored. The court will ordinarily  
10 deny such motions in the absence of a showing of manifest error in the  
11 prior ruling or a showing of new facts or legal authority which could not  
12 have been brought to its attention earlier with reasonable diligence.

13 Local Rules, W.D. Wash. LCR 7(h)(1).

14 In this case, Mullens argues that the Court committed manifest error based on  
15 controlling Ninth Circuit authority that was not brought to the Court's attention earlier.  
16 Dkt. 23 at 2 (citing *S.J. v. Issaquah Sch. Dist. No. 411*, 470 F.3d 1288 (9th Cir. 2006)).  
17 Even if *S.J.* is controlling, which it appears to be, the Court would still decline to adopt  
18 the R&R because it recommended denying Defendants' motion based on the propositions  
19 that (1) "borrowing state law will not frustrate or interfere with implementing national  
20 policies" and (2) when a federal court screens a pro se prisoner complaint, "the time for  
21 service is suspended until the court enters an order directing service of the amended

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22 <sup>1</sup> The Court grants the motion to allow the late filing because, as explained herein,  
Defendants are not prejudiced by consideration of the late filing.

1 complaint.” Dkt. 17 at 3–4. Defendants objected by citing controlling authority for the  
2 proposition that a similar state statute implementing service requirements does not  
3 conflict with Federal Rule of Civil Procedure 4(m). *Torre v. Brickey*, 278 F.3d 917, 919  
4 (9th Cir. 2002). In the face of this apparent controlling authority, the Court turned to  
5 principles of equity and equitable tolling to address what seemed to be an inequitable  
6 result of barring a prisoner’s complaint due to initial screening delays. Dkt. 19.  
7 Fortunately, Mullens’s appointed counsel placed *S.J.* in the record, which appears to be  
8 on all fours with the issue in this case. The question now is how best to address the issue.

9       The Court concludes that, with counsel appointed, it is best to follow the  
10 principles of due process and present a fully briefed motion. Technically, Defendants’  
11 motion to dismiss is still pending because it has neither been granted nor denied. Thus, it  
12 seem appropriate for Mullens to respond and Defendants to reply. Moreover, nothing in  
13 the Court’s order, which was based on the broad principles of *Bd. of Regents v. Tomanio*,  
14 446 U.S. 478, 485 (1980), *abrogation on other grounds recognized by Farrell v.*  
15 *McDonough*, 966 F.2d 279, 280 (7th Cir. 1992), conflicts with the more specific holding  
16 of *S.J.* It cannot, because the Ninth Circuit may not overturn the Supreme Court.  
17 Therefore, the Court denies Mullens’s motion for reconsideration because he has failed to  
18 show manifest error and he may still obtain his requested result of denial of the pending  
19 motion to dismiss.

**III. ORDER**

Therefore, it is hereby **ORDERED** that Mullens's motion to allow late filings (Dkt. 24) is **GRANTED** and motion for reconsideration (Dkt. 23) is **DENIED**.

Dated this 1<sup>st</sup> day of April, 2016.



BENJAMIN H. SETTLE  
United States District Judge